ORIGINAL

DOCKET FILE COPY ORIGINAL

MAY 30 1996

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)))	CC Docket No. 96-98

To: The Commission

REPLY COMMENTS OF COX COMMUNICATIONS, INC.

Werner K. Hartenberger
Laura H. Phillips
J.G. Harrington

Its Attorneys

DOW, LOHNES & ALBERTSON
A Professional Limited Liability Company
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036
(202) 776-2000

May 30, 1996

No. of Copies rec'd 0+12
List ABCDE

SUMMARY

In adopting rules in this proceeding, the Commission must focus on the Congressional intent to encourage facilities-based competition and to minimize the need for micromanaging regulatory intervention in the relationships between telecommunications carriers. The Commission can best implement Congressional intent by adopting a basic national framework to govern intercarrier negotiations and arbitrations under Sections 251 and 252 that maintains flexibility for States to tailor arbitration results to local conditions.

Contrary to LEC arguments, the Commission has been granted the authority to promulgate national rules implementing all of Sections 251 and 252, both explicitly in the 1996 Act and through its general rulemaking powers under the Communications Act. National standards are necessary to prevent incumbents from exercising the considerable bargaining power that arises from their current monopoly bottleneck and overwhelming resources. A national framework for arbitration would ensure reasonable outcomes in arbitrations and provide incentives for successful negotiations. National rules will be important to both current and future interconnection negotiations.

The Commission should adopt the framework proposed in Cox's initial comments, which addresses the objections to national standards. Because Cox's framework would apply only in arbitrations, it would permit parties to negotiate other arrangements if doing so was mutually beneficial. The Cox model avoids rigidly determined results in arbitrations and preserves the State role in conforming arbitration decisions to the needs of the parties. The Cox model also avoids the one-sided bargaining incentives created by proposals that would

adopt only floors or ceilings on compensation for transport and termination and unbundled elements.

• THE COX MODEL •

- Parties are free to negotiate any arrangements they desire, subject to the limits of Section 252(e).
- The FCC's standards apply only when one or more elements of an agreement must be arbitrated and then only to those elements that are subject to arbitration. In any arbitration, the parties may not propose and the state may not adopt any result that is inconsistent with the FCC's standards.
- For arbitrated agreements, compensation for reciprocal transport and termination may range from bill and keep to LRIC with bill and keep as the proxy for cases where approximate cost cannot be easily determined.
- Interim compensation for transport and termination, both during the pendency of the negotiations and where the state is unable to reach a final determination during the 270 day period shall be bill and keep.
- For arbitrated agreements, prices for unbundled elements and Section 251(c) interconnection may range from TSLRIC for the entire service, allocated to specific elements, to FDC, with a proxy such as BCM or the Hatfield study to be used where approximate cost cannot be easily determined.
- All of the incumbent LEC's existing points of interconnection, including meet points, are deemed reasonable. The requesting carrier shall be able to obtain other points of interconnection to the extent they are technically feasible.
- All of the incumbent LEC's existing technical forms of interconnection are deemed reasonable, as are any that were available in at least the last 24 months. The requesting carrier also shall be able to obtain other technically feasible forms of interconnection.

The pricing standards under the Cox model also should be adopted. Bill and keep and LRIC are appropriate parameters for compensation for reciprocal transport and termination because they are based solely on the "additional cost" of that function, which is mutually beneficial interconnection between carriers. They also are consistent with the language of the statute and with Constitutional principles. TSLRIC and FDC are the appropriate boundaries for unbundled elements because they permit LECs to recover the costs associated with the purchase of a service where no mutual benefit of traffic transport and termination is exchanged. Although incumbent LECs seek to obtain far higher levels of compensation (*i.e.*, profits that exceed FDC), their arguments are inconsistent with the 1996 Act, with the Congressional intent to benefit consumers through competition and with sound economics.

The Commission also should reject ILEC efforts to evisercate the basic requirements of Sections 251 and 252 by proposing rules that shelter ILECs from competition. Contrary to ILEC assertions, the 1996 Act does not permit incumbent LECs to impose separate "interconnection" charges for reciprocal transport and termination and regulatory acquiescence to such charges would only stifle competition. The Commission also should require incumbents to conform to basic minimum technical standards to avoid delays in negotiations caused by refusals to provide existing interconnection arrangements and to prevent incumbents from providing low quality service. In addition, CMRS providers should be accorded their rights to obtain interconnection via Section 332(c). Incumbents also should not be permitted to evade their responsibility to negotiate individually with telecommunications carriers by imposing form agreements or by refusal to extend the terms of adjacent carrier agreements to new entrants.

Additionally, the Commission should maintain the specific distinctions between types of carriers that Congress adopted in Section 251. Neither the Commission nor the States should impose requirements beyond those in Section 251 on non-incumbents or non-LECs because doing so would be contrary to Congressional intent to avoid regulation except where it is necessary to promote the public interest in the development of competitive markets to the benefit of American consumers.

Finally, as it deliberates on final rules for local competition, the Commission should remain cognizant of its past experience in injecting competition into the customer premises equipment and long distance markets. Because, as Cox previously explained in its white paper on local competition, many of the ILEC arguments against full competition now are strikingly similar to the incumbent's arguments twenty years ago, the Commission has the requisite experience to act in the public interest to promote truly national local competition.

TABLE OF CONTENTS

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	

To: The Commission

REPLY COMMENTS OF COX COMMUNICATIONS, INC.

Cox Communications, Inc. ("Cox"), by its attorneys, hereby submits its reply comments in the above-referenced proceeding.[1] The comments in this proceeding show why the Commission should focus on the intent of Congress to encourage facilities-based competition and to minimize the need for detailed after the fact regulatory intervention under the Telecommunications Act of 1996.[2] The way to achieve those goals is to adopt a basic national framework that encourages successful interconnection negotiations by putting boundaries on the results of State arbitrations, while maintaining State flexibility to determine appropriate results within national parameters. Consequently, the Commission should resist the entreaties of incumbent LECs, who have resurrected arguments the Commission long ago discredited and who have demonstrated their intention to delay the development of competition.

These reply comments address a limited number of issues raised in comments. First, they show why the Commission can and should adopt national rules for interconnection

---

1/ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Notice of Proposed Rulemaking, CC Docket No. 96-86, FCC 96-182, rel. Apr. 19, 1996 (the "Notice").

2/ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (the "1996 Act").

negotiations and arbitrations consistent with the framework described in Cox's initial comments. Second, they address the standards to be used in arbitrating disputes concerning compensation for reciprocal transport and termination (which should range from bill and keep to long run incremental cost), and pricing of unbundled elements and Section 251(c) interconnection (which should range from total service long run incremental cost to fully distributed cost). Third, these reply comments discuss the basic requirements that must apply to negotiations under Sections 251 and 252. Finally, Cox shows why the Commission should maintain the statutory distinctions between types of carriers contained in the 1996 Act.

I. THE COMMISSION MUST ADOPT NATIONAL STANDARDS IMPLEMENTING THE LOCAL COMPETITION PROVISIONS OF THE 1996 ACT. (Notice Section II.A. and Section III.A.)

A. The Commission Has the Power to Adopt Regulations Implementing Sections 251 and 252. (Notice Section II.A.)

As Cox and numerous other parties demonstrated in their comments,[3] the Commission has both the power and the responsibility under Sections 251 and 252 to adopt national standards to implement local competition. Nonetheless, some State commission and incumbent local exchange carrier ("ILEC") commenters dispute either the Commission's authority to promulgate national standards or the wisdom and need for a set of uniform rules. These comments reflect unsubstantiated concerns that Commission rules will impede the progress certain states made in implementing local competition prior to the 1996 Act, and that national standards will unduly interfere with the responsibilities assigned to State commissions under the 1996 Act. While some States appear to accept that national policies

3/ See, e.g., Comments of the Department of Justice at 8-15; see also Comments of Tele-Communications, Inc. at 5; Comments of AT&T at 3.

might offer useful and important guidance to States in the arbitration process,[4] other State organizations oppose nearly any Commission action on national standards.[5] ILECs and their trade association also are uniformly in favor of limiting the Commission's role to that of a fringe player with relatively minor responsibilities, except when it comes to adoption of rules that might limit their interconnection obligations or that would strategically maximize their cost recovery for essential functions provided to competitors.

Arguments against national standards and a strong Commission role in interpreting the statute are contradicted by the new law itself. Congress instructed the Commission in Section 251(d) to adopt implementing regulations for the interconnection of all telecommunications carriers covered by Section 251. Contrary to NARUC's assertion, Congress' instruction was not limited to a few "express" provisions of Section 251 such as number portability requirements, resale regulations and determining unbundled network elements.[6] In fact, Section 251(d)(3)(C) gives the Commission broad power to define both the scope of "the requirements of this section and the purposes of this part." These "requirements" include implementing policies on LEC duties to establish reciprocal compensation, negotiation for interconnection and unbundled elements and resale. Specifically, the Commission is required to assure that interconnection and unbundled access are made available "on rates, terms and conditions that are just, reasonable, and nondiscriminatory . . . [in accordance with] the requirements of this section and section 252." Section 251(c)(3).

4/ Comments of Ohio at 19-20; Comments of Kentucky at 3-4.

5/ Comments of National Association of Regulatory Utility Commissioners ("NARUC") at 4-10.

6/ Id. at 14-15.

It is simply not plausible that Congress envisioned that the Section 252 State arbitration process would have no relationship to the Commission's requirements and responsibilities set forth in Section 251. If the Commission were to accept this argument, it would be unable to carry out its assigned responsibilities, such as judging the reasonableness of rates for unbundled elements.[7/] It is for this reason that many commenters, including the Department of Justice, concluded the Commission must adopt national regulations because formulation of national policy is part and parcel of the Commission's responsibility.[8/] Many other commenters agreed that the Commission inherently has the power to interpret a federal statute where it is the expert agency.[9/]

Even those commenters that seek to minimize the need for Commission involvement do not deny that the Commission is required to adopt regulations to be able to fulfill its statutory role.[10/] These commenters acknowledge that, when states fail to act on arbitrations,

---

7/ The Commission could, of course, determine the reasonableness of rates after the fact, but such an approach would significantly impede the purpose of the 1996 Act.

8/ While the Department acknowledges the importance of the states' role, it correctly recognizes that the "uncertainty inherent in such state-by-state regulatory decision-making will seriously delay and impede entry. And recognizing these facts, ILECs will have substantially greater incentives to delay and litigate, rather than negotiate reasonable arrangements with entrants. . . [A]doption of national standards in this context would constitute a sound policy choice by the Commission . . . the Department does not believe that differences among the States are sufficiently great as to militate against national standards." Comments of DOJ at 12-13 (notes omitted). The Department's view is consistent with Cox's position, that national pricing standards would not infringe on the State's "critically important role of determining the reasonableness of individual ILEC rates." Id. at 24-25.

9/ See Chevron U.S.A., Inc. v. Nat'l Resources Defense Council, 476 U.S. 837 (1984); see also Texas Utility Electric Co. v. FCC, 997 F.2d 925, 933 (1993).

10/ Comments of Bell Atlantic at 40; Comments of BellSouth at 2; Comments of Georgia at 5; Comments of NARUC at 4.

the Commission is required to step in.[11/] The main concern expressed is that Commission action might constrain contrary State actions. These commenters, however, do not reconcile the purported need for such undirected State regulatory flexibility with the specific statutory purpose of the 1996 Act — to rapidly open local markets to competition pursuant to coherent, discrete cost and price standards.

No commenter has seriously disputed that the Commission's establishment of pricing principles or parameters as part of its initial regulations will provide a useful guide to the states, reviewing courts and the parties to individual negotiations as to the Commission's interpretation of the statute's baseline requirements. As BellSouth points out, it is likely that federal courts will refer any appeals of State decisions to the Commission for its review in the first instance under the doctrine of primary jurisdiction.[12/] Even if reviewing courts do not refer appeals to the Commission, having the Commission interpret the 1996 Act's pricing standards now will make it far easier for the courts to quickly resolve future appeals.

Perhaps the most compelling reason in support of the Commission's tentative conclusion that national rules should be adopted was identified by the Department of Justice:

> By reducing the possible divergence in state pricing regulation, the Commission's proposal would reduce another potential barrier to entry by new entrants who desire to implement a national or regional competitive entry strategy. The articulation by the Commission of broad pricing principles would also greatly simplify the arbitration duties of the states, who otherwise would be forced to resolve many complex pricing issues.[13/]

Ironically, the same incumbent LECs that argue there should be a negotiation free-for-all with no national pricing standards actually assert that the Commission can and should

---

11/ Comments of BellSouth at 2; Comments of Ohio at 6.

12/ Comments of BellSouth at 9.

13/ Comments of DOJ at 26.

adopt some standards. The national standards these parties seek to have the Commission adopt, however, would not advance competition, but rather would shield ILECs from the financial impact of competition, delay resolution of arbitrations or limit an ILEC's obligations under Section 251 For example, USTA, while opposing any national pricing standards, urges Commission adoption of a *bona fide* request model as a national standard to "provide guidelines to the states so that undue economic and technical burdens are not imposed on smaller LECs."[14]

The State commenters that oppose "intervention" in the negotiation/arbitration process by FCC adoption of national standards also argue that under traditional preemption analysis, Section 2(b) fences off from Commission jurisdiction intrastate pricing determinations, leaving the Commission with the legal authority only over interstate pricing. It is virtually impossible, however, to read Sections 251 and 252 as protecting "intrastate" pricing from the FCC's Section 251 jurisdiction in this fashion. As discussed above, the FCC was specifically instructed by Congress to adopt rules implementing Section 251. Even Section 252 requires States to conform their arbitrations to "the regulations prescribed by the Commission pursuant to Section 251." 47 U.S.C. § 252(c)(1). Further, the pricing standards contained in Section 252(d), which the States are legally bound to apply in arbitrations, are completely intertwined with Section 251. Because both Section 252(d)(1) and (d)(2) specifically refer to Section 251 it is plain that the Commission, and not the States, must define pricing requirements for both interstate *and* intrastate interconnection in order to fulfill Commission obligations spelled out in Section 251.[15]

14/ Comments of United States Telephone Association ("USTA") at 87.

15/ Of course, the Commission has the general power to adopt rules implementing (continued...)

That interconnection, the acknowledged essential element to establishing competition, must be subjected to traditional interstate and intrastate analysis plainly is not contemplated anywhere in the 1996 Act or its legislative history.[16/] In fact the legislative history recites that the 1996 Act is "a new model for interconnection." Any conclusion that States are free to ignore FCC rules implementing Section 251 and apply conflicting rules for "intrastate" interconnection pricing would merely recreate the interconnection conditions[17/] in place prior to the passage of the 1996 Act and would plainly frustrate the rapid introduction of competition.

15/ (...continued)
the provisions of the Communications Act, including Sections 251 and 252, and to preempt State and local rules that inhibit competition. See 47 U.S.C. § 154(i) (the Commission "may make such rules and regulations" as necessary); and 47 U.S.C. § 253.

16/ Even commenters that attempt to use Section 2(b) as a way to prevent application of national standards admit that the Commission is empowered to adjudicate matters that otherwise would fall to the states under Section 252 in the absence of State action. They also acknowledge that there are specific powers assigned to the Commission under Section 251 that require the Commission to act globally. See Comments of NARUC at 15. For instance, there is no apparent argument that it is the FCC's function to identify basic unbundled elements, while permitting individual States to require more aggressive ILEC unbundling requirements.

17/ Cox refers here solely to landline interconnection, as LEC-to-CMRS interconnection is wholly within the FCC's jurisdiction as provided in Sections 2(b) and 332.

B. The Commission Should Adopt Standards that Encourage Successful Negotiations and Give State Commissions the Ability to Respond to the Circumstances of Each Arbitration. (Notice Section II.A. and Section III.A.)

1. There Is a Need for National Standards.

Many commenters oppose national standards because they do not want the Commission to dictate the results of the negotiation process mandated by Section 252.[18] Others argue that standards are not necessary to level the playing field for negotiations.[19] These commenters forget the lessons of the past, misunderstand how national standards should be applied and misconstrue how bargaining leverage works.

First, national standards cannot override the 1996 Act, which permits negotiated agreements "without regard to the standards" of Section 251.[20] Standards can apply only when parties reach the arbitration stage. Even then, as Cox has proposed, the standards adopted by the Commission would not set a single price, but rather would create a range of acceptable prices, based on the specific costs demonstrated by individual carriers.[21] This approach permits arbitrators to make carrier-specific determinations that account for local requirements.

The Commission might be able to adopt less restrictive rules if ILECs and new entrants could negotiate on a level playing field. But the statute itself demonstrates that the

---

18/ See, e.g., Comments of Ohio at 5; Comments of Connecticut at 8.

19/ See, e.g., Comments of SBC Communications at 5-12 (claiming that negotiations are likely to involve sophisticated entities with significant financial strength).

20/ 47 U.S.C. § 252(a).

21/ As discussed infra., in addition to acceptable ranges, the Commission would also set "default" proxies that states would use if carriers were unable to demonstrate their costs using acceptable cost methodologies.

playing field is far from level. ILECs have a 100 year home court advantage. Despite complaints from the BOCs that they will have to deal with "national" companies, in practice the BOCs have far greater resources and access to much better information about their networks and network planning than the parties with whom they will be negotiating. For instance, Cox is one of the largest cable operators in the country, but its gross revenues are about 15 percent of those of Pacific Telesis.[22/] Unlike PacTel, Cox's business interests are diversified far beyond the telecommunications market. This difference in resources and information plainly has an effect on Cox's bargaining leverage.

Incumbent LECs also have bargaining advantages unrelated to their size. Incumbent LECs do not need interconnection agreements to operate their businesses, but new entrants do.[23/] As a consequence, delays in negotiations hurt new entrants (because they cannot enter the business) while enhancing incumbents' profits (because they have no competition). As described in Cox's initial comments, this gives incumbents significant bargaining power.[24/] This advantage exists whether Cox is negotiating with Pacific Bell or the Roseville Telephone Company.[25/]

22/ See Pacific Telesis Group reports earnings for first quarter to March 31; N.Y. TIMES, Apr. 19, 1996, at D5 ($2.3 billion in quarterly revenues); Cox Communications, Inc. reports earnings for first quarter to March 31; N.Y. TIMES, May 9, 1996 at D6 ($357 million in quarterly revenues). Following the mergers of Pacific Telesis and SBC Corp. and of NYNEX and Bell Atlantic the disparity between most new entrants and the BOCs will be even greater.

23/ See Joseph Farrell, "Creating Local Competition," speech delivered at FCC brown bag lunch, May 15, 1996 at 2.

24/ See Declaration of Dr. Gerald Brock, attached to Cox's initial comments as Exhibit 3 (the "Brock Declaration"), at 2-3 (describing study on the effects of differences in value of successful negotiations on the outcome of negotiations).

25/ Id.

Moreover, incumbents are arguing in this proceeding for rules that would insulate them from the impact of the new law, increase their bargaining leverage and further disadvantage new entrants. These attempts range from urging the Commission to adopt the discredited Efficient Component Pricing Rule ("ECPR") method to assess ILEC costs[26/], to urging the Commission to "enforce" non-existent prohibitions against bypass[27/], to stalling the initiation of interconnection discussions until the incumbent deems the request "*bona fide*",[28/] to even arguing that unbundling should not be required.[29/] Another proposal to require new entrants to reimburse incumbents for the costs of responding to a request for interconnection is a perfect example of an attempt to load the costs of competition onto competitors.[30/] One incumbent even suggests that the arbitration required by the 1996 Act is not binding, leaving a final, *de novo* determination to the courts.[31/]

The incumbent's arguments against strong national standards and for regulatory protection are highly reminiscent of arguments and strategies that the Bell System employed with dogged determination in the 1970s to forestall competition in the customer premises

26/ See Comments of GTE at 63 and GTE's attachment 4 by Doane, Sidak and Spulber at I-1.

27/ See Comments of Bell Atlantic, Declaration of Robert Crandall at 6.

28/ Comments of USTA at 14-15.

29/ U S West attachment by Robert Harris and Dennis Yao at 17.

30/ Comments of Ameritech at 94-95.

31/ Comments of SBC Corp. at 104. This argument is entirely inconsistent with the statute. First, the arbitration provisions provide no indication that they are not binding. 47 U.S.C. § 252(b), (c), (e). Second, under the 1996 Act, review by a district court is limited to the legal question of whether an arbitrated agreement is consistent with the requirements of Sections 251 and 252. 47 U.S.C. § 252(e)(6). Finally, where *de novo* review is required, Congress says so. See, e.g., 47 U.S.C. § 504(a) (trial *de novo* in suits to collect forfeitures).

equipment and long distance markets.[32/] While the Commission now must labor under strict statutory deadlines, Cox has confidence that the Commission can dispassionately review this record, apply its judgment and experience and reject incumbent's pleas to protect their rates and rate structures from the impact of competition as so much recycled rhetoric.

2. National Rules Are Important Because They Will Be Relevant to Current and Future Negotiations.

Several commenters argue that adoption of national standards is unnecessary because interconnection negotiations under Section 251 will be concluded promptly. As a threshold matter, however, there will be an ongoing need for federal rules because the negotiation and arbitration process will continue long after this proceeding is completed. Under the express terms of Section 252, even private negotiations that began on the date of enactment of the 1996 Act will not be required to complete the State arbitration process until three months after the Commission is required to implement interconnection and access rules pursuant to Section 251(d) of the 1996 Act.[33/] The very statutory framework established by Congress thus undercuts the LECs' claim that interconnection negotiations will be concluded so quickly as to obviate the need for the Commission to establish permanent national rules.

Moreover, even if all initial negotiations were resolved before the Commission's August 8, 1996 deadline for adoption of permanent interconnection rules, national rules still would be necessary. Not all would-be interconnectors will have entered the market or even

---

32/ Just prior to the passage of the 1996 Act, Cox filed a white paper with the Commission that laid out the history of Bell Systems gamesmanship with the Commission and the States. See Back to the Future: The FCC and Local Exchange Competition Into the Next Century, filed January 25, 1996 in CC Docket No. 94-54.

33/ See 47 U.S.C. § 252(b)(1) (arbitration must be completed within 270 days after a request for interconnection is made); cf. 47 U.S.C. § 251(d)(1) (the Commission must adopt interconnection rules pursuant to 1996 Act by August 8, 1996).

filed requests with incumbent LECs before the Commission adopts rules. Some competing LECs already have concluded interconnection agreements with incumbent LECs,[34] but many competing LECs have not yet made their interconnection requests. Furthermore, the cycle of private negotiations and arbitrations will begin again after the initial interconnection agreements expire. For example, the recently concluded MCI-BellSouth interconnection agreement is limited to a term of two years.[35] National rules also will be necessary for the Commission to arbitrate cases where States fail to act on arbitration requests.[36] Section 252(e)(5) expressly provides that the Commission shall assume the arbitration role when a State fails to act.[37] For all of these reasons, national rules to prevent anticompetitive harm to new entrants due to delay or discrimination in the arbitration process are critical to the development of pro-competitive interconnection agreements to facilitate new entry into the local exchange and promote the goals of the 1996 Act.

34/ See, e.g., MFS Completes Landmark Regional Co-Carrier Interconnection Agreement With Ameritech, PR Newswire, PointCast Network, released May 22, 1996.

35/ See BellSouth and MCI Sign Key Interconnection Pact Running 2 Years, COMM. DAILY, May 17, 1996, at 3.

36/ Commission rules also will assist in evaluating BOC applications for interLATA authority under Section 271. See 47 U.S.C. § 271(c)(2)(B).

37/ It is not unreasonable to expect that some States will be unable to fulfill their obligations. In the related State certification process, for example, some States have neglected to consider, let alone act on competitive LEC applications for operating authority. Absent a national backstop to adequately redress State inaction, these competitive LEC cases have languished before the State PUCs, in some instances for over half a decade. See Herb Kirchoff, Force Open Local Competition in D.C., MFS Tells FCC, STATE TEL. REG. REP., May 16, 1996, at 1.

3. The Cox Model Meets the Need for National Standards Without Unreasonably Limiting the Ability or Incentive of Parties to Reach Negotiated Agreements.

The framework proposed in Cox's initial comments provides a model the Commission can use to equalize bargaining power. The Cox model is based on the principles adopted by Congress in the 1996 Act and is consistent with the statutory bias in favor of negotiations and State determinations in arbitrations.[38/] It also addresses the concerns raised by parties who object to national standards or who express concerns about the statutory price differentials causing arbitrage.

Under that framework, arbitrations would be governed by a set of standards, but negotiations would be subject only to the limits of Section 252(e). In an arbitration, the compensation for reciprocal transport and termination could range from bill and keep to LRIC, and the prices for unbundled elements could range from TSLRIC, allocated to individual elements, to FDC (in exceptional cases). States would to use bill and keep as a proxy for the costs of transport and termination and a specific model, such as BCM or the Hatfield study, as a proxy for the costs of unbundled elements when approximate cost cannot be easily determined. Bill and keep would be adopted as an interim compensation mechanism for transport and termination during negotiations and, if a state is unable to determine the appropriate compensation during the statutory 270 day period, until the state reaches a decision. Finally, all of a LEC's existing points of interconnection and all of its existing technical forms of interconnection would be deemed reasonable, as would any

---

38/ This model is described in more detail in Cox's comments at 43-46. The specific terms used to describe the pricing boundaries for transport and termination and facilities obtained under Section 251(c) are defined in a glossary attached hereto as Exhibit 1. This glossary also was attached to Cox's initial comments.

interconnection that was available in at least the last 24 months preceding the request for interconnection.

First and most importantly, the Cox model does not force negotiations to reach a preconceived result.[39/] The parties to any negotiation would be free to bargain away from the basic requirements if they so desired and if they believed that doing so would be mutually beneficial. At the same time, the model sets reasonable, binding boundaries for negotiations, so that neither party can expect unilaterally to impose an unreasonable result.[40/] This increases the incentives to bargain fairly from the outset.

Second, several parties object to national standards because they fear that such standards will not be adapted to individual circumstances.[41/] The model addresses this concern by setting boundaries that accommodate an individual ILEC's costs, rather than by depending on a national average.[42/] This approach gives States the flexibility to adapt arbitration results to the specific requirements of individual situations. At the same time, the model strongly encourages the use of proxies, which will make it easier for States to reach decisions in any arbitrations they may conduct.

39/ See, e.g., Comments of Massachusetts at 2; Comments of Maryland at 4.

40/ The reasonableness of the costing boundaries and technical requirements proposed by Cox is discussed in more detail in Parts II and III, below.

41/ See, e.g., Comments of Connecticut at 8; Comments of BellSouth at 36-38.

42/ The Cox model does not require the Commission to set a permanent single price that applies to all transactions. See Comments of AT&T at 46. Doing so would be contrary to the 1996 Act, which does not permit the Commission to set specific mandatory prices determined through the State arbitration process and which requires different cost determination mechanisms for reciprocal transport and termination and for facilities obtained through Section 251(c). See 47 U.S.C. § 252(b) (reserving right to make determinations in arbitrations to the States); Comments of Cox at 21-23 (describing distinctions in cost standards under Section 251(d)(1) and (d)(2)).

Third, the Cox model demonstrates there is no risk of "arbitrage" between Section 251(b)(5) and Section 251(c) if the statute is interpreted properly. As shown in Cox's initial comments, reciprocal transport and termination and unbundled elements under the Cox framework are not substitutable for each other, so there is no opportunity for arbitrage.[43]

Fourth, the model addresses the concern of several LECs that national technical standards could lock the telephone industry into specific technologies.[44] This is unlikely to be a serious risk, given that new entrants are likely to have more advanced technology than incumbents. Nevertheless, the Cox model establishes only minimum technical standards that are based on the technologies in use at the time a request is made. This permits any carrier to implement new technologies in its network, or to negotiate with connecting carriers to upgrade the technology used for interconnection.

Fifth, the model avoids concerns created by certain other proposals in this proceeding. For instance, unlike USTA's proposal for standards for *bona fide* negotiation requests, the model avoids the pitfall of imposing detailed requirements on new entrants before they enter negotiations.[45] The USTA standards would strangle competition by requiring too much information at the outset, in effect asking competitors to provide information they are unlikely to have until well after negotiations have commenced.[46]

43/ See Comments of Cox at 33-36.

44/ See, e.g., Comments of SBC at 90-92; Comments of USTA at 11-12; Comments of Connecticut at 9.

45/ The USTA proposal is highly reminiscent of the process for obtaining "new" services under Open Network Architecture, which worked almost entirely to the advantage of the BOCs and has provided very few services purchased by enhanced services providers.

46/ Some of this information, such as specific points of interconnection, is likely to change in the course of negotiations, so requiring it before negotiations begin is pointless.

Finally, the Cox model avoids the one-sided bargaining incentives created by proposals that would set only floors or ceilings on compensation. Some commenters have proposed, for instance, using LRIC as a floor or FDC as a ceiling above or below which, respectively, any LEC price would be presumed reasonable.[47/] However, any floor or ceiling, by itself, cannot create appropriate bargaining incentives because it constrains only one party. Indeed, "ceiling" proposals that entitle the LEC to any price up to the ceiling create little incentive for the incumbent LEC to bargain at all below that level. Both parties in a negotiation will have incentives to bargain only when there are meaningful constraints on the best result that both can expect. The Cox model, by giving both parties an incentive to negotiate and by putting limits on the results they can expect to obtain from arbitration, will achieve the results that Congress expected when it adopted the 1996 Act.

II. COX'S PROPOSED PRICING STANDARDS ARE CONSISTENT WITH STATUTORY OBJECTIVES, BASIC CONSTITUTIONAL PRINCIPLES AND SOUND PUBLIC POLICY. (Notice Section II.C.5 and Section B.2. and Section III. A

While many commenters in this proceeding recognized that reciprocal transport and termination and use of ILEC unbundled elements are two separate concepts,[48/] ILEC comments universally muddied the waters between the very distinct differences in cost recovery for these functions that are reflected in the 1996 Act. The Commission accordingly

47/ See, e.g., Comments of BellSouth at 5-6; Comments of Cincinnati Bell at 30-31; Comments of USTA at 49.

48/ See Comments of MFS at 80 ("MFS believes that Congress was unambiguously clear in establishing different pricing standards in Sec. 252(d)(1) and (d)(2) . . . ."); see also Comments of Teleport at 46-47 (calling for the use of forward-looking economic costs for pricing physical interconnection, unbundled network elements and collocation versus using bill and keep for pricing transport and termination); Comments of Sprint Spectrum and APC at 6-7 (discussing the different pricing standards of Sections 252(d)(1), (d)(2) and (d)(3)).

must be extremely clear in its rules to implement the obvious purpose of the pricing provisions and to ensure that the procompetitive intent of the statute is carried out.

A. Bill and Keep and LRIC Are Appropriate Boundaries for Arbitrated Compensation for Reciprocal Transport and Termination. (Notice Section II.C.5)

Section 252(d)(2) of the 1996 Act provides that an ILEC mutually exchanging traffic with a competing provider of local exchange service be compensated only for its "additional cost" incurred by this exchange. This additional cost standard demonstrates that Congress intended to minimize the compensation flowing from one local service provider to another for reciprocal transport and termination of traffic.[49/] Not only is this statutory standard unequivocal, it also makes sense. As the record reveals, where traffic is balanced between competing local exchange networks (and there is no reason to expect that it will not be), the transaction is an economic wash. Moreover, even where traffic is not in balance the additional costs for reciprocal transport and termination are minuscule and the costs of measuring or performing additional cost studies may well prove more costly than the provision of capacity to competitors. Moreover, transport and termination is not a one-sided arrangement — each carrier provides transport and termination for the other, and each benefits from the arrangement on every call because all customers want to be able to make and receive calls from all other customers in the area.

In keeping with this Congressional intent to keep charges for reciprocal compensation low, Cox's proposed boundaries for arbitrated compensation for reciprocal transport and

---

49/ For this reason the Commission cannot accept the ILEC argument that "additional cost" is a floor and not a ceiling on permissible cost recovery for reciprocal transport and termination. See, e.g., Comments of Bell Atlantic at 35; Comments of Ameritech at 62. This is particularly the case because the *only* compensation *expressly* approved in the entire 1996 Act is bill and keep for reciprocal transport and termination.

termination are LRIC as one bound and bill and keep as the other. Cox further proposed that bill and keep be used as a cost proxy where the ILEC cannot or does not demonstrate additional costs.[50/] Where such costs can be demonstrated, they are appropriately limited to LRIC because LRIC reflects the actual cost of providing additional capacity and thus is the most accurate method for estimating "additional cost."[51/]

In contrast, a number of commenters suggest that TSLRIC is the appropriate standard both for reciprocal transport and termination and for unbundled elements and interconnection associated with unbundled elements. As Cox explained in its comments, however, Sections 252(d)(2) and 252(d)(1) simply do not permit such a generalized approach to two very distinct economic transactions governed by entirely different statutory costing standards. Unlike LRIC, TSLRIC is generally understood to include common costs associated with the decision to provide an entire "service."[52/] Applying such a standard is inconsistent with the statutory language of Section 252(d)(2) allowing only the recovery of "additional costs" for reciprocal transport and termination. It also is inconsistent with treating the exchange of traffic as a mutual benefit, which is what Congress contemplated in Section 251(b)(5).[53/]

50/ This cost proxy could be used on an interim basis during the pendency of negotiations and arbitrations, or as a permanent solution whenever the ILEC cannot or does not credibly demonstrate its additional costs using a LRIC methodology.

51/ See Comments of Cox, Brock Declaration at 6. This cost methodology includes a normal profit, as well, so there can be no question that it is compensatory.

52/ See Exhibit 1. For instance, the cost of a loop under the TSLRIC methodology would include an allocated portion of the costs common to the provision of local exchange service as a whole.

53/ As explained below, TSLRIC is an appropriate cost recovery standard for the provision of a service such as the purchase of unbundled elements or collocation with the ILEC.